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Comptroller General
of the United States

Washington, D.C. 20548

Decision

(Corrected Copy)

Matter of: Technical Ordnance, Inc.

File: B-236873

Date: January 19, 1990

DIGEST

1. General Accounting Office will not reexamine contracting agency's determination of nonresponsibility where a small business concern has not timely filed a complete application for certificate of competency with the Small Business Administration.
2. Contracting agency has sole discretion to extend period within which a small business concern may apply for certificate of competency.
3. Protester's right to procedural due process does not require advance disclosure of pre-award survey results or an opportunity for contractor to defend position where this information is used to find the protester not responsible for a single procurement.

DECISION

Technical Ordnance, Inc., a small business concern, protests the determination that it was not a responsible contractor under request for proposals (RFP) No. DAAA09-88-R-1140, issued by the U.S. Army Armament, Munitions and Chemical Command (AMCCOM).

We deny the protest.

The solicitation was issued on February 27, 1989, for M206 flare impulse cartridges. Technical Ordnance was the apparent low offeror of the three firms submitting proposals by the closing date of March 29, and thus was in line for award. On May 30, AMCCOM concluded that Technical Ordnance was not responsible based on a negative pre-award survey which found Technical Ordnance unsatisfactory in the areas of technical ability, production capacity, quality assurance, plant security and manufacturing safety. By letter dated May 30, AMCCOM referred the matter to the Small

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Business Administration (SBA) for a certificate of competency (COC) determination in accordance with Federal Acquisition Regulation (FAR) § 19.602-1 (FAC 84-51).

On June 7, the SBA informed Technical Ordnance of the reasons it was found nonresponsible, that the deadline for the firm's COC application was June 16, 1989, and specified what forms must be completed to make application. The time for submission was extended subsequently to June 19, on which date the protester submitted an incomplete application. This application was not complete because it did not include a Form 355 as requested in the SBA June 7 letter. The protester states that it then submitted a Form 355 to SBA on June 21. However, the SBA denies receiving a Form 355 from the protester until June 28, the deadline by which SBA had to issue a COC, unless an extension was obtained from AMCCOM. FAR § 19.602-2. Since Technical Ordnance did not submit a complete application by the required deadline and since AMCCOM declined to grant a further extension beyond June 28, the SBA declined to issue a COC.

On June 29, Technical Ordnance protested the rejection of its proposal to AMCCOM. AMCCOM denied Technical Ordnance protest on August 21, leading to the instant protest which was filed with our Office on September 8, 1989. Technical Ordnance claims that AMCCOM's determination of nonresponsibility is based upon inaccurate information contained in a pre-award survey of which the contractor was not apprised. Technical Ordnance also claims that this matter was not appropriate for consideration under the COC procedures since one of the reasons it was found not responsible involved the manufacturing safety area, which all parties agree is under the cognizance of the Department of Defense and not subject to COC proceedings. See FAR § 19.601(b).

We find the agency acted properly in referring the determination that Technical Ordnance was not responsible to SBA for a COC. In this regard, Technical Ordnance was found not responsible for four reasons not related to manufacturing safety which were unquestionably subject to COC procedures. Moreover, Technical Ordnance only complained about the application of the COC procedures after it was rejected for failing to timely submit a complete COC application.

Since the matter was properly before the SBA, that agency--not our Office--had the statutory authority to review the contracting officer's finding of nonresponsibility, and the SBA determination to issue or refuse to issue a COC was conclusive with respect to all aspects of that small

business concern's responsibility. 15 U.S.C. § 637(b) (1982); F.W. Morse & Co., B-227995, Oct. 26, 1987, 87-2 CPD ¶ 396. Our review of such matters is limited to determining whether bad faith or fraudulent actions on the part of a government official resulted in denial of the protester's opportunity to seek SBA review, or whether the SBA's denial of a COC was made as the result of bad faith or a failure to consider vital information bearing upon a firm's responsibility. 4 C.F.R. § 21.3(m)(3) (1989); American Indus. Contractors, Inc., B-236410.2, Dec. 15, 1989, 89-2 CPD ¶ ____.

Technical Ordnance alleges the SBA refused in bad faith to consider the firm's application for a COC. However, the SBA responds that the protester was not issued a COC because it failed to timely provide the required Form 355, which addresses the threshold question of firm size.

In this case, Technical Ordnance admits that it did not submit the required Form 355 any earlier than June 21, after the extended June 19 deadline set by the SBA, and only a week before the June 28 date by which SBA was required to determine whether to issue a COC. Moreover, there is no evidence of record that the SBA actually received the Form 355 before June 28. The record also does not substantiate Technical Ordnance's contentions that the SBA acted in bad faith and that the real reason the COC was not issued was that the manufacturing safety issue was not within the SBA's cognizance. To the contrary, the record shows that Technical Ordnance's failure to submit a timely COC application was the reason the COC was not issued.

While Technical Ordnance insists that a faulty pre-award survey provided the contracting agency with some misinformation, Technical Ordnance was obliged to apply for a COC, and to timely present all of the information which the firm thought relevant to the SBA's inquiry. Action Building Sys., Inc., B-237067, Oct. 4, 1989, 89-2 CPD ¶ 311. In this regard, we will not ordinarily reexamine a contracting agency's determination of nonresponsibility where a small business has not effectively applied for a COC. T.J. O'Brien Co., Inc., B-233176, Dec. 30, 1988, 89-1 CPD ¶ 4. To review an agency nonresponsibility determination where the affected small business concern fails to apply for a COC would effectively substitute our Office for the SBA--the agency designated to perform such a review. Id. Therefore, SBA's failure to issue a COC is conclusive regarding Technical Ordnance's responsibility on this procurement.

We also do not find that AMCCOM was required to extend Technical Ordnance's time for completing its SBA application. In this regard, the FAR seeks to balance the small firm interest in receiving an independent evaluation of performance capability with the agency obligation to execute a procurement. FAR §§ 19.602-1 and 2(a); Spheres Co., B-225755, June 5, 1987, 87-1 CPD ¶ 573. After the SBA failed to issue a COC within the allotted time and AMCCOM denied the SBA's request for an extension, the contracting officer proceeded appropriately, under FAR 19.602-4(c), to select another offeror for the contract award. While it is true that AMCCOM, in its sole discretion, may elect to extend the period within which Technical Ordnance might file for or receive a COC, the controlling consideration was the government's interest in fulfilling the procurement, not the contractor's interest in obtaining an extension. Carolina Parachute Corp., B-233359, Nov. 1, 1988, 88-2 CPD ¶ 426. Our Office will not review the agency's refusal to grant an extension.

Technical Ordnance asserts finally that it was entitled by due process to notice of the bases for the firm's rejection, including a copy of the pre-award survey, prior to the contracting officer's determination of nonresponsibility. We have held that, except in cases amounting to debarment or suspension, a party's right to procedural due process does not require the advance disclosure of pre-award survey results or an opportunity for the contractor to defend its position, because a contracting officer's procurement responsibility determination is in the nature of an administrative decision and not a judicial one. Energy Management Corp., B-234727, July 12, 1989, 89-2 CPD ¶ 38; Oertzen & Co. GmbH, B-228537, Feb. 17, 1988, 88-1 CPD ¶ 158. Since this protest concerns only a single procurement and there has been no indication or allegation of debarment or suspension, we do not find any violation of Technical Ordnance's due process rights.

The protest is denied.


James F. Hinchman
General Counsel